(46)

No. 84-1044

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

PACIFIC GAS AND ELECTRIC COMPANY,
Appellant,

v.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,
TOWARD UTILITY RATE NORMALIZATION, CONSUMERS UNION,
CONSUMERS FEDERATION OF CALIFORNIA,
COMMON CAUSE OF CALIFORNIA,
CALIFORNIA PUBLIC INTEREST RESEARCH GROUP, AND
CALIFORNIA ASSOCIATION OF UTILITY SHAREHOLDERS,
Appellees.

On Appeal From The Supreme Court of California

REPLY BRIEF OF APPELLANT PACIFIC GAS AND ELECTRIC COMPANY

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28 pp

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES CITED

Cases

TABLE OF AUTHORITIES CITED

CASES

Constitution

Text

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INTRODUCTION AND SUMMARY OF ARGUMENT

Appellant, Pacific Gas and Electric Company (PGandE), hereby submits its reply brief to the briefs on the merits filed by the Public Utilities Commission of the State of California (CPUC or commission) and by Toward Utility Rate Normalization, Consumers Union, Consumer Federation of California and Public Interest Research Group, (collectively referred to hereinafter as "TURN").

The appellees and the *amici curiae* in support of them argue what is not in issue. PGandE is not asserting that the First Amendment has been violated because, in some months, it may be required to pay additional postage if it wishes to include its own message in the billing envelope. (Comm'n Br. at 8; TURN Br. at 5-9.) Nor is it asserting that it is entitled, under the First Amendment, to send its own messages to its customers at ratepayers' expense. (Comm'n Br. at 21-22; TURN Br. at 7.) PGand E is asserting its First Amendment right to be free from government compulsion to carry the messages of others.

PGandE has not argued that its First Amendment rights are absolute, but rather that they may not be abridged without a compelling state interest. There is no issue as to whether the commission can compel PGandE to mail the commission's own notices to utility customers. The commission has failed to meet the standards set forth in *Consolidated Edison Co. v. Public Service Comm'n*, 447 U.S. 530 (1980) and *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980) for regulating the contents of PGandE's envelope.

Appellees' basic argument is that they disagree with *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), *Consolidated Edison* and *Central Hudson*. Moreover, they incorrectly assume that because PGandE is a corporation *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), and *Wooley v. Maynard*, 430 U.S. 705 (1977) do not apply because these cases are allegedly reserved for those who exercise individual freedom of thought. *Bellotti* refutes their argument. Furthermore *Consolidated Edison* held that a state's regulation of speech in a utility's billing envelope requires a compelling state

interest. *Central Hudson* held that a state's regulation of the commercial speech of a utility requires that the regulation directly advances the state's interest; and "if the governmental interest [can] be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive." (447 U.S. at 564.)

Hence, the critical issue here is whether the State of California has met the standards for compelling a privately owned public utility to become the courier of the fund solicitation messages of a private party.

I

THE PRINCIPLE ANNOUNCED IN *MIAMI HERALD PUBLISHING CO. V. TORNILLO* APPLIES TO THIS CASE.

A. *Tornillo*'s Principle Is Not Limited To Conventional Media Corporations

This Court, quoting *Lovell v. City of Griffin*, 303 U.S. 444, 451-452 (1938), recently observed, in *Lowe v. Securities and Exchange Comm'n*, ____ *U.S.* ____, *86 L.Ed.2d 130, 147-148 (1985):*

> 'The liberty of the press is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets. . . . The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion.'

For over 60 years the billing envelope has been appellant's primary mechanism for communicating with its customers. Even though PGandE is not a newspaper, the principles of *Tornillo*, nevertheless, apply unless the State asserts an interest sufficient to justify its regulation. *Bellotti* refused to adopt the idea that media corporations are entitled to greater First Amendment protection than other corporations. "If we were to adopt appellee's suggestion that communication by corporate members of the institutional press is entitled to greater constitutional protection than the same communication by appellants, the result would not be responsive to the informational purpose of the First Amendment." (435 U.S. at 782, n. 18.) If PGandE can be compelled to serve as

a fund raising conduit for TURN or other private groups, then there is no limit to the State's ability to ultimately force other state regulated corporations, whether utility or not, to carry similar messages for any private group asserting an interest in the business of the regulated corporation.[1]

In *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, ____ U.S ____, 105 S.Ct. 2939 (1985), which involved the application of *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) to cases where false and defamatory statements do not involve matters of public concern, Justice Brennan, joined by Justices Marshall, Blackmun and Stevens rejected the idea that a non media entity is entitled to less protection than a "media" entity. "Such a distinction is irreconcilable with the fundamental First Amendment principle that '[t]he inherent worth of . . . speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union or individual. [Citation omitted]" (105 S.Ct. at 2957, Brennan, J., dissenting, joined by Marshall, J., *Blackmun*, J. and Stevens, J.) Justice Brennan made clear that "the argument that Gertz should be limited to the media misapprehends our cases." (*Id.* at 2958.) According to Justice Brennan:

> We protect the press to ensure the vitality of First Amendment guarantees. [Footnote omitted] This solicitude implies no endorsement of the principle that speakers other than the press deserve lesser First Amendment protection. (*Id.* at 2958.)

Justice White, concurring in the judgment and citing *Bellotti*, also emphasized that "this Court has made plain that the organized press has a monopoly neither on the First Amendment nor on the ability to enlighten." (*Id.* at 2953, n. 4, White, J., concurring.)

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[1] California extensively regulates many industries, professions, banks and other corporations. In its *amicus curiae* brief, the California Chamber of Commerce, which represents more than 4,800 members from virtually every industry and geographic section in California, explains the potential impact on the numerous other businesses regulated by the State if this Court accepts the State's argument. (*Brief of The California Chamber of Commerce, Amicus Curiae, In Support of Appellant Pacific Gas and Electric Company* at 13-15.)

Chief Justice Burger, concurring separately in the judgment, intimated that he agreed with Justice White's First Amendment observations. (*Id.* at 2948, Burger, C. J., concurring.) The plurality stated that its holding did not mean that Dun & Bradstreet's speech was "subject to reduced constitutional protection because it constitutes economic or commercial speech." (*Id.* at 2947, n. 8, Powell, J., Plurality opin., joined by Rehnquist, J. and O'Conner, J.) The appellees' central argument that PGandE is not entitled to the protection of *Tornillo* has been soundly rejected.

B. *Tornillo* Is Not Otherwise Distinguishable

The principles announced in *Tornillo*, according to appellees, have no implication "here because the Commission's decision does not grant access to *Progress* itself; it merely grants access to the billing envelope—the means of delivery. . . ." (Comm'n Br. at 24.) Under appellees' reasoning, Florida's right of reply statute could have been upheld had it merely required that a separate insert, replying to the editorials, be delivered by the Miami Herald's delivery trucks and newspaper delivery persons—the means of delivery—rather than requiring that the reply be printed in the Miami Herald itself. But separate inserts delivered via the Miami Herald's means of delivery would not have made the Florida statute constitutional.

Tornillo is not limited to "editorial judgment."[2] The *Tornillo* Court would have found the right of access impermissible even if

[2]TURN's claim that "the freedom of editorial judgment which protects newspapers from governmental interference does not apply to speakers engaged in commercial transactions" (TURN Br. at 23) is contrary to law. Moreover, TURN's argument that "the billing envelope, unlike a newspaper, exists primarily to fulfill a commercial transaction" (TURN Br. at 23) and that this "Court has previously intimated that *Tornillo* does not apply to commercial speech" (*Id.*) is equally unsupportable. The appellee in *Bellotti* argued similarly "that First Amendment rights generally have been afforded only to corporations engaged in the communications business or through which individuals express themselves." (*First National Bank of Boston* v. *Bellotti*, 435 U.S. at 781.) Rejecting that argument, the Court emphasized in *Bellotti* that "the press does not have a monopoly on either the First Amendment or the ability to enlighten." (*Id.* at 782.) Finally, the Court explained: "Nor

the incremental cost of delivering those inserts had been paid for by the sender, because "the implementation of a remedy such as an enforceable right of access necessarily calls for some mechanism, either governmental or consensual." (*Miami Herald Publishing Co. v. Tornillo, supra*, 418 U.S. at 254.) "If it is governmental coercion, this at once brings about a confrontation with the express provisions of the First Amendment and the judicial gloss that Amendment developed over the years." (*Id.*) It is, therefore, irrelevant whether TURN is seeking to have its fund solicitations printed on the pages of *Progress* or delivered in PGandE's billing envelope because compelled delivery of TURN's messages "fails to clear the barriers of the First Amendment. . . ." (*Miami Herald Publishing Co. v. Tornillo, supra*, 418 U.S. at 258.)

II

THE FIRST AMENDMENT RIGHTS NOT TO SPEAK OR ASSOCIATE EXTEND TO CORPORATIONS, AND ARE NOT RESERVED SOLELY FOR INDIVIDUALS

A. Since The Right Not To Speak Or Associate Serves The Same Ultimate End As The Right To Speak Or Associate, Corporate Identity Is Irrelevant

1. The Right Not To Speak Or Associate Serves The Same Ultimate End As The Right To Speak Or Associate

Both TURN and the commission argue strenuously that PGandE is not entitled to protection of what they call "negative" First Amendment rights.[3] TURN, for example, claims that: "It is readily apparent that the design and purpose of the First Amend-

do our recent commercial speech cases lend support to appellee's business interest theory." (*Id.* at 783.)

[3] This Court has not labeled First Amendment rights as "negative" or "affirmative", but instead has held that the First Amendment protects both the right to speak and to refrain from speaking, as well as the right to associate and not to associate. Appellees' extensive reliance upon "affirmative" and "negative" First Amendment rights apparently is based on a law review article. (See Gaebler, *First Amendment Protection Against Government Compelled Expression And Association*, 23 B.C.L. Rev. 995 (1982).)

ment do not support equivalence between the 'affirmative' rights to speak and associate freely and the 'negative' rights not to speak and associate." (TURN Br. at 13.) The commission contends similarly that its decision is valid because "unlike *Bellotti and Consolidated Edison*, the State has placed no cognizable restriction on protected affirmative speech." (Comm'n Br. at 20.)

Just recently, in *Harper & Row, Pub., Inc. v. Nation Enterprises,* ___ U.S. ___, 85 L.Ed.2d 588 (1985), the Court suggested that there is no appreciable difference between "affirmative" and "negative" First Amendment rights. Citing *Wooley*, the Court said that "freedom of thought and expression 'includes both the right to speak freely and the right to refrain from speaking at all.' " (*Id.* at 606.) Justice O'Connor, writing for the Court, cited approvingly the words of New York's Chief Judge Fuld who said that the right not to speak serves the same ultimate purpose as the right to speak:

> 'The essential thrust of the First Amendment . . . shields the man who wants to speak or publish when others wish him to be quiet. There is necessarily, and within suitably defined areas, a concomitant freedom *not* to speak publicly, one which serves the same ultimate end as freedom of speech in its affirmative aspect. Estate of Hemingway v. Random House, 23 NY2d 341, 348, 244 NE2d 250, 255 (1968).' (*Id.*) (emphasis in original).

TURN's claim that "[a] compulsion to speak, unlike a prohibition of speech, does not stifle the First Amendment interchange and thus does not endanger the 'marketplace of ideas,' " (TURN Br. at 14) ignores a basic tenet of the First Amendment. It fails to recognize that the First Amendment "protects against compelled expression or association of any sort so long as it is not outweighed by a countervailing government interest." (Gaebler, *First Amendment Protection Against Government Compelled Expression and Association,* 23 B.C.L. Rev. 995, 996, n. 3 (1982); see also, *Wooley v. Maynard, supra,* 430 U.S. at 716.) Thus, *Wooley* is not limited to individuals; it applies to corporations as well.

2. Corporate Identity Is Irrelevant To The Right Not To Speak Or Associate

It matters not whether the speaker is an individual or a corporation, a State cannot compel the carrying of someone else's message unless "the State's countervailing interest is sufficiently compelling to justify" (*Wooley v. Maynard, supra,* 430 U.S. at 716) the forced association. *Wooley,* which relied specifically upon *Tornillo,* was "faced with the question of whether the State may constitutionally require an individual to participate in the dissemination of an ideological message by displaying it on his private property in a manner and for the express purpose that it be observed and read by the public." (*Id.* at 713.) In *Bellotti*, which specifically involved the application of the First Amendment to corporations, the Court addressed the issue "whether the corporate identity of the speaker deprives . . . speech of what otherwise would be its clear entitlement to protection" (435 U.S. at 778) and held that is does not. Requiring PGandE to use its own billing envelope to mail TURN's fund solicitations constitutes no less a compulsion than in *Wooley* or that held impermissible in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977). It forces PGandE to foster and associate with an ideological activity it prefers not to foster or be associated with.[4] Moreover, *Tornillo* and *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94 (1973) also "rest on the fundamental principle that the coerced publication views, as much as their

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[4] Expressing its concerns about forced association, this Court in *Abood* emphasized the opposition of First Amendment authors James Madison and Thomas Jefferson to forced association:

> This view has long been held. James Madison, the First Amendment author, wrote in defense of religious liberty: 'Who does not see . . . [t]hat the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?' 2 The Writings of James Madison 186 (Hunt ed. 1901). Thomas Jefferson agreed that 'to compel a men to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical.' [Citation omitted.] *Abood v. Detroit Board of Education, supra,* 431 U.S. at 234-235, n. 31.

suppression, violates the freedom of speech." (*Herbert v. Lando*, 441 U.S. 153, 178, n. 1, (1979) (Powell, J., concurring).) This principle applies without regards to corporate identity.

B. The Right Not To Speak Or Associate Is Not Based On Individual Freedom Of Thought

Whether PGandE has individual freedom of thought is not relevant to this appeal. "In cases where corporate speech has been denied the shelter of the First Amendment, there is no suggestion that the reason was because a corporation rather than an individual or association was involved [citations omitted]." (*First National Bank of Boston v. Bellotti, supra*, 435 U.S. at 778, n.14.) The commission claims that: "The interest underlying the First Amendment rights to refrain from speaking and to refrain from associating with the views of another . . . is very different from the broad societal interest identified in *Bellotti, Consolidated Edison*, and *Tornillo*." (Comm'n Br. at 36.) This assertion, however, directly contradicts *Bellotti* because: "The Constitution often protects interests broader than those of the party seeking their vindication. . . . The proper question . . . is not whether corporations 'have' First Amendment rights and, if so, whether they are coextensive with those of natural persons. Instead, the question must be whether [the regulation] abridges expression that the First Amendment was meant to protect."[5] (*First National Bank of Boston v. Bellotti, supra*, 435 U.S. at 776.)

Limiting First Amendment rights only to those who have "individual freedom of thought" would, indeed, ultimately pose a serious danger to First Amendment rights in general. "It is open to question whether limitations can be placed on the free expression rights of some without undermining the guarantees of all." (*Id.* at 798, n.2 (Burger, C.J., concurring).) Contrary to the

[5] The commision's contention that PGandE's First Amendment rights are significantly diminished because "the California regulatory scheme leaves little in the way of private corporate autonomy to its regulated utilities" (Comm'n Br. at 40) cannot be squared with this Court's opinion that: "Nor does Consolidated Edison's status as a privately owned but government regulated monopoly preclude its assertion of First Amendment rights." (*Consolidated Edison Co.* v. *Public Service Comm'n, supra*, 447 U.S. at 534, n.1.)

arguments of appellees. "the First Amendment does not 'belong' to any definable category of persons or entities: It belongs to all who exercise its freedoms." (*Id.* at 802, Burger, C.J., concurring.) This, of course, includes appellant.

C. *PruneYard* Does Not Rest On The Principle That Rights Not To Speak Or Associate *Are Reserved To Individuals*

PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980), upheld a state law requiring that shopping center property, already open to the public to come and go as it pleased, could not be closed to those who desired to speak or gather signatures. TURN argues that *PruneYard* applies here rather than *Wooley* and *Barnette* because these cases dealt with individual freedom of mind whereas *PruneYard* did not. (TURN Br. at 33-36.) *PruneYard* not only does not support this argument, it does not even suggest that its holding was in any way related to the shopping center's lack of individual freedom of mind. Nor did the *PruneYard* Court distinguish *Wooley* or *Barnette* on this basis.

Wooley was distinguished not on the basis that the individuals in *Wooley* could exercise individual freedom of mind, and that a shopping center cannot, but rather, *inter alia*, on the "important" fact that "the shopping center by choice of its owner is not limited to the personal use of appellants." (*PruneYard Shopping Center v. Robins, supra*, 447 U.S. at 87.) "It is instead a business establishment that is open to the public to come and go as they please."[6] (*Id.*) Nor was *Barnette* distinguished by the *PruneYard* Court on the basis that individual freedom of thought does not apply to shopping centers. Rather, it was distinguished on the

[6] *PruneYard* is quite different from the instant case in several other important aspects. First, unlike a billing envelope, which is closely associated with the sender, it is extremely remote and highly unlikely that anyone would think the shopping center owners favored the high school student petitioners there. Second, unlike in *PruneYard*, PGandE has an affirmative duty to use "its equipment" (J.S., app. at 23) to publish in its billing envelope a particular message written by TURN. When an envelope is received, which carries the name of the sender, as does the PGandE envelope, the assumption is that the message therein belongs to the sender or is at least endorsed by the sender.

basis that "it involved the compelled recitation of a message containing an affirmative belief." (447 U.S. at 88.) *PruneYard* does not apply to a billing envelope. This was implicitly recognized by Justice Marshall's concurring opinion: "*The California Supreme Court's decision is limited to shopping centers*, which are already open to the general public."[7] (*Id.* at 94, Marshall, J., concurring.) (emphasis added).

In short, *PruneYard* did not permit the government to require PruneYard to open portions of the shopping center that were closed to the public; nor did it permit government to choose the speakers allowed to speak. It would not, finally, have permitted the government to require PruneYard advertisements and mailings to include others' messages. *PruneYard* offers no support for the commission's order that PGandE become the courier of TURN's fundraising messages.

III

THE FIRST AMENDMENT RIGHTS NOT TO SPEAK OR ASSOCIATE ARE NOT MADE IRRELEVANT TO THIS CASE BY THE NATURE OF THE BILLING ENVELOPE

A. Application Of These Rights Cannot Be Avoided By Classifying The Billing Envelope As A "Passive Receptacle"

TURN defines the billing envelope as "a passive receptacle or conduit" (TURN Br. at 25) and concludes it is not entitled to the First Amendment protections set forth in *Consolidated Edison.*[8]

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[7] Justice White, also concurring in *PruneYard,* was agreeable to permitting "entry on [shopping center] property for the purpose of communicating with the public about subjects having no connection with the shopping centers' business" (*Id.* at 95, White, J., concurring); but he foresaw the danger in a blanket extension of the application of *PruneYard* when he asked: "May a State require the owner of a shopping center to . . . [furnish] a convenient place for them to urge their views on the public and to solicit funds from likely prospects?" (*Id.* at 96, White, J., concurring.)

[8] An envelope is the mechanism by which one uses the mail system. Without it there can be no communications. It is an inseparable part of communicating through the mail, and as such, it is an integral part of

But this argument is contrary to *Consolidated Edison.* Under TURN's analysis, had New York simply defined Consolidated Edison's billing envelope to be a "passive receptacle" it could have precluded Consolidated Edison from inserting its messages therein. But, the *Consolidated Edison* Court would have also rejected this approach since regulating speech in the utility's envelope must be judged by "whether the State can demonstrate that its regulation is constitutionally permissible." (*Consolidated Edison, supra,* 447 U.S. at 535.)

The same compelling interest standard applied to the utility billing envelope in *Consolidated Edison* also applies here. Otherwise, *Consolidated Edison's* holding becomes illusory. All New York need do, under TURN's rationale, to change the application of *Consolidated Edison,* is simply rule that the billing envelope is "a passive receptacle or conduit" which has "no identity of its own as a medium of communication." (TURN Br. at 25.) As such, New York could then prohibit the inclusion of utility messages in this "passive receptacle." *Consolidated Edison* does not support such a ploy. It, therefore, matters not whether New York is prohibiting Consolidated Edison from speaking in the envelope or California is compelling PGandE to put TURN's messages therein, the regulation is nevertheless subject to strict scrutiny.

B. Application Of Those Rights Cannot Be Avoided By Classifying The Empty Space In The Billing Envelope As "Ratepayers' *Property*" *Or "Government Property"*

As PGandE points out in its brief, its consitutional rights cannot be abridged by merely classifying the empty space in the billing envelope as ratepayer property. (PGandE Br. at 30-32.) The commission now asserts that its order can be upheld on a new theory that " [t]he billing space is a nonpublic forum over which

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speech. For example, in *Lamont v. Postmaster General,* 381 U.S. 301 (1965), the Court quoted approvingly language from *Milwaukee Pub. Co. v. Burleson,* 255 U.S. 407, 437 (1921) (Holmes, J., dissenting): " 'The United States may give up the Post Office when it sees fit, but the use of the mails is almost as much a part of free speech as the right to use our tongues. . . .' " (*Lamont, supra,* at 305.) Envelopes are "tongues" for communicating via the mail.

the Commission, by its broad regulatory powers, has the right to make distinctions in access on the basis of subject matter and speaker identity." (Comm'n Br. at 34.) Although the commission did not rely in its decision on this ground, it now relies on a series of cases that deal with the government's right to control access to government property.[9]

Even if the nonpublic forum argument were properly before the Court, it would be completely without merit. The analogy of a utility's billing envelope to a public facility has already been rejected. In *Consolidated Edison*, New York relied heavily on *Greer v. Spock*, 424 U.S. 828 (1976) and *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974), as does TURN here, to argue that the billing envelopes are similar to public facilities. Responding, the Court said:

> The analysis of *Greer* and *Lehman* is not applicable to the Commission's regulation of bill inserts. In both cases [*Greer* and *Lehman*], a private party asserted a right of access to public facilities. Consolidated Edison has not asked to use the offices of the Commission as a forum from which to promulgate its views. *Rather it seeks merely to utilize its own billing envelopes to promulgate its views on controversial issues of public policy*. (447 U.S. at 539-540.) (emphasis added).

In *Perry Educational Ass'n v. Perry Local Educators Ass'n*, 460 U.S. 37 (1983), the Court distinguished *Consolidated Edison* from cases involving access to government property. "Indeed in *Consolidated Edison*, which concerned a utility's right to use its own billing envelope for speech purposes, the Court expressly

[9] In *Consolidated Edison*, the New York commission claimed that its action "would prevent ratepayers from subsidizing the cost of policy-oriented bill inserts." (*Consolidated Edison Co. v. Public Service Comm'n*, 447 U.S. at 543.) Not having made that argument in the proceedings below, New York's argument was rejected. "The Commission did not rely on the argument that the use of bill inserts required ratepayers to subsidize the dissemination of management's view in issuing its order, and we therefore are precluded from sustaining the order on that ground. (Cf. *SEC. v. Chenery Corp.*, 318 U.S. 80, 95 (1943)" (*Id.* at 544, Marshall, J., concurring).)

distinguished our public forum cases, stating that 'the special interest of government in overseeing the use of its property' were not implicated." (*Id.* at 49, n. 9.)

In public forum cases, the question has been whether persons have a constitutional claim of access to public property. This case does not deal with a claim that access is being denied to what the commission has suddenly declared to be public property.[10] If the theory of the public forum cases were applied to utility billing envelopes, however, the commission could properly decide that the sole purpose of the envelope is to communicate billing information and deny PGandE access to include *Progress* therein. Hence, the holding in *Consolidated Edison* would be illusory because it could be overturned by fictional definitions or redefinitions of property interests in the empty space of the billing envelope. *United States Postal Service* v. *Council of Greenburgh Civic Ass'ns*, 453 U.S. 114 (1981), on which the commission places great emphasis, underlines this point. Justice Stevens, in dissent, argued that public forum theory was inapplicable to access to letterboxes because they were owned by homeowners. That argument was rejected or ignored by all other members of the Court, who analyzed the right of access to letterboxes without reference to whether those boxes were owned by the postal service or homeowners. Similarly, in this case, the First Amendment issues do not turn on the abstract metaphysical question of ownership of the empty space in the billing envelope. Just as First Amendment rights were denied in *Consolidated Edison*, regardless of who owned the empty space in the billing envelope, they are also denied here no matter where state law places the "ownership" interest.

[10] In *City Council of Los Angeles v. Taxpayers For Vincent*, ____ U.S. ____, 104 S. Ct. 2118, 2134, n. 31 (1984), the Court rejected the idea that merely because property is owned or controlled by the government it may be used for communication.

C. Application Of These Rights Cannot Be Avoided By Classifying The Contents Of The Billing Envelope As Commerical Speech

TURN claims that regulations concerning the contents of the billing envelope are justified because "[t]he billing envelope exists primarily for the furtherance of a commercial transaction." (TURN Br. at 23.) PGandE's right not to carry TURN's message does not relate to commercial speech, but even if it is characterized as commercial in nature, it is still protected by the First Amendment and "[t]he State must assert a substantial interest to be achieved by [its] restrictions. . . ." (*Central Hudson Gas & Electric Corp. v. Public Service Comm'n, supra,* 447 U.S. at 564.)

Therefore, even if PGandE's envelope is classified as commercial, it is still protected by the First Amendment; and the State cannot compel PGandE to carry TURN's messages unless it meets the standards for regulating commercial speech. (See also, *Zauderer v. Office of Disciplinary Council,* ___ U.S. ___, 85 L.Ed. 2d 652, 671 (1985) ("... broad prophylactic rules may not be so lightly justified if the protections afforded commercial speech are to retain their force.")) Hence, California has the burden, which it has failed to meet, of at least complying with the test set forth in *Central Hudson:*

> The State must assert a substantial interest to be achieved by restrictions on commercial speech. Moreover, the regulatory technique must be in proportion to that interest. *The limitation on expression must be designed carefully to achieve the State's goal.* Compliance with this requirement may be measured by two criteria. First, *the restriction must directly advance the state interest involved; the regulation may not be sustained if it provides only ineffective or remote support for the government's purpose. Second, if the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive.* (*Central Hudson Gas & Electric Corp. v. Public Service Comm'n, supra,* 447 U.S. at 564.) (emphasis added).

IV

THE COMMISSION'S ORDER IS BASED ON EVALUATION OF THE VIEWPOINTS OF TURN AND OTHER POTENTIAL SPEAKERS

A. PGandE Is Not Asserting The Rights Of Speakers Who Might Be Denied Access To The Billing Envelope, But Is Asserting Its Own Right Not To Carry The Messages Of Others; This Argument Is Not Premature

The commission argues that PGandE lacks standing to make its claim that the choice of speakers entitled to access to the billing envelope involves prohibited viewpoint discrimination, because "it has no standing to raise the claims of third parties *who are its adversaries.*" (Comm'n Br. at 28.) (emphasis added). PGandE, however, is not asserting the rights of those who have, in the past, or may, in the future, be denied access. PGandE is asserting its own First Amendment right not to carry the messages of others. It is precisely because those whose messages PGandE will be required to carry will emanate from those "who are its adversaries," (*Id.*) that the abridgment of PGandE's rights is exacerbated. PGandE is not complaining of the standards the commission may employ to pick and choose among its adversaries, but of a state policy, prohibited by the First Amendment, that emphasizes the adversity of the speaker's position to PGandE as the reason PGandE must carry the message.[11]

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[11] The commission's argument that its regulation is a valid time, place and manner regulation because TURN has "no comparable channel of communication" (Comm'n Br. at 33) does not meet the test for the application of the time, place or manner doctrine. As explained in PGandE's brief on the merits, "Time, place or manner restrictions apply only when regulating an already existing, independent right to exercise protected rights." (PGandE Br. at 21.) But, even if the doctrine did apply, the commission's decision still fails the *Consolidated Edison* test because it does not serve a significant governmental interest, nor is it narrowly tailored. (447 U.S. at 536.) Moreover, the order "not only promotes one viewpoint at the expense of others, but also provides public access to a traditionally private forum. . . . [S]uch a regulation cannot be upheld as a reasonable time, place, and manner restriction." (*Oregon*

The same distortion of PGandE's position is reflected in the commission's argument that PGandE's content-based discrimination claim is "premature" because "[t]he Commission's decision does not refuse billing envelope access to any one, and there is no certainty it will ever do so." (Comm'n Br. at 28.) On October 17, 1984, the commission in *Committee of More Than 1 Million California Taxpayers To Save Prop. 13 v. Pacific Gas and Electric Company et al.* (Decision No. 84-10-062, Oct. 17, 1984; J.S., app., p. 157.) did, in fact, refuse billing envelope access to a political group. Although the group alleged that ratepayers would benefit from receiving accurate information about the ballot proposition, the commission, nevertheless, disagreed claiming the group's bill inserts would not "improve consumer participation in our proceedings." (J.S., app., at 161.)

B. The Choice Of Speakers Whose Messages PGandE Must Carry Inevitably Rests On Viewpoint Discrimination; TURN Was Chosen Because It Presented A Consumer Viewpoint Opposed To That Of PGandE

Appellees' arguments that the selection of TURN as the speaker to use PGandE's envelope is not viewpoint based, but rather permissible "viewpoint-neutral distinctions based on speaker identity in order to ensure that the purposes it [the commission] sought to achieve in opening up the billing envelope are satisfied" (TURN Br. at 45) are contrary to the facts of this case. TURN was chosen by the commission, by its own admission, because TURN's selection would give "residential ratepayers in PGandE's service territory . . . an opportunity to be informed of and to support advocacy efforts on their behalf through use of the extra space in the billing envelope." (J.S., app. at 16.) It was not chosen because of what it intended to say on behalf of commercial, industrial or other classes of ratepayers.[12]

Independent Telephone Ass'n v. *Citizens' Utility Board of Oregon*, Civ. No. 85-875-PA, D. Ore., decided Sept. 10, 1985; slip op. at 9.)

[12] On September 10, 1985, the United States District Court for the District of Oregon struck down a similar provision of Oregon law which required Oregon utilities to include utility consumer inserts in the billing envelope. (*Oregon Independent Telephone Ass'n v. Citizens' Utility Board of Oregon*, (Civ. No. 85-875-PA, D. Ore., decided Sept. 10, 1985.)) The court made clear that: "By providing a forum for the interest of utility consumers only, the Act favors one viewpoint at the expense of others and is not content neutral." (*Id.*, slip op. at 6-7.)

Like in *Police Department of Chicago v. Mosley*, 408 U.S. 92, 102 (1972), the selection here of TURN "is based on the content of [its] expression."

Finally, the appellees claim that the content of TURN's message is left to TURN. This is irrelevant because: "Even when the state does not mandate a particular message, first amendment interests are affected when the state forces a property owner to admit third-party speakers." (*Oregon Independent Telephone Ass'n v. Citizens' Utility Board of Oregon.* (Civ. No. 85-875-PA, D. Ore., decided September 10, 1985; slip op. at 7 (holding unconstitutional an Oregon bill insert statute similar to the commission's order.))

V

ALL STATE INTERESTS ASSERTED TO JUSTIFY ABRIDGMENT OF PGandE's FIRST AMENDMENT RIGHTS ARE EITHER ILLEGITIMATE OR COULD EASILY BE ACHIEVED WITHOUT ABRIDGING THE EXERCISE OF PROTECTED FIRST AMENDMENT RIGHTS

As pointed out in PGandE's brief on the merits, "all of the identified governmental interests could be easily achieved by means which do not in any way infringe PGandE's First Amendment rights." (PGandE Br. at 37.) PGandE is not asserting that its First Amendment rights not to speak or not to associate are absolute or "that government may never require a person to convey a message not his own." (TURN Br. at 18.) Rather, it is contending that this abridgement must be justified by a compelling state interest. And, even if the lesser First Amendment standards suggested by appellees are adopted, all asserted state interests are either impermissible or easily achieved by other means.[13] Two related arguments merit further brief comment.

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[13] The commission's regulation cannot survive the *Central Hudson* standards for regulating commercial speech because it does not directly advance consumer participation in rate proceedings. The regulation fails

A. The Asserted Interest In Exposing PGandE Customers To Views That Differ From Those Of PGandE Is An Interest Inconsistent With The First Amendment When It Is Accomplished By Requiring PGandE To Carry Those Views

TURN argues that the commission's order will enable "the ratepayers to receive information through the billing envelope from a variety of sources thus [promoting] a core First Amendment value." (TURN Br. at 39.) This argument is inconsistent with *Buckley v. Valeo*, 424 U.S. 1 (1976). This claim is similar to the argument rejected in *Buckley* "that the ancillary governmental interest in equalizing the relative ability of individuals and groups" (*Buckley v. Valeo, supra*, 424 U.S. at 48) was sufficient to infringe First Amendment freedoms. Here, TURN says the government's interest is to "expose the ratepayers 'to a variety of views' and thus assure 'more complete ratepayer understanding . . . [of] energy issues involving their utility.'" (TURN Br. at 39.) This is not only an anti-First Amendment argument, but there is no authority for the proposition that the First Amendment permits California to abridge PGandE's rights in order to enhance TURN's voice. A similar interest was expressly rejected by the

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the test that excessive restrictions cannot survive when the end can be achieved by more limited restrictions. California's alleged goals can be directly, not remotely, achieved by awarding intervenor fees as allowed by law in California. (See J.S. app. at 151.) The only limitation placed on TURN's use of funds collected from bill insert solicitations is the general requirement that the funds "be solely for purposes related to ratepayer representation in Commission proceedings involving PGandE." (J.S., app. at 32.) TURN need not show that it used the funds collected to directly advance the state's interest. Intervenor fees would, however, directly advance the state's interest because they cannot be awarded unless the commission finds, *inter alia*, that TURN made "a substantial contribution to the adoption, in whole or in part, of the commission's order or decison." (J.S., app. at 154.) No such requirement is needed under the commission's bill insert order. Moreover, unlike the statute (J.S., app. at 155), there are no procedures for an audit of the use of the funds collected through bill inserts. Finally, the statute does not discriminate as does the Commission's order on the basis of viewpoint. The decision below falls far short of the requirements of *Central Hudson*.

Buckley Court as being contrary to the First Amendment. "But the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." (424 U.S. at 48-49.)

B. The Asserted Interest In Exposing PGandE Customers To Other Views Is Not Validated By The False Assertion That PGandE Has A Monoply On Communications With Its Ratepayers

The commission's anti-First Amendment interest is not validated by the assertions that PGandE has available to it channels of communication to its customers that are unavailable to organizations such as TURN. The commission argues that it may be unable to disclose PGandE's customer lists to third parties for any purpose, and thus no one but PGandE will be able to address PGandE customers. (Comm'n Br. at 33.) The commission's claim that a California decision forbidding warrantless searches for unlisted names and addresses in criminal cases (*People v. Chapman*, 36 Cal.3d 98, 201 Cal.Rptr. 628, 679 P.2d 62 (1984) forbids it to release mailing lists to organizations like TURN (Comm'n Br. at 33, n. 35) is fanciful. Where there are state interests that can be easily achieved without abridging First Amendment rights, the state cannot disable itself from doing so, and then argue that it has an interest—compelling or otherwise—in complying with its own law.[14]

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[14] The state's asserted interest in *Consolidated Edison*, of negating the utility's "free ride," was not compelling because it could be achieved by adjustments in the rate-making process without denying the utility the right to speak. That interest would not have become "compelling" if state law had not permitted the rate-making adjustment. It would, of course, be irrelevant whether the state's self-imposed disability was contained in statute or the state constitution. California's argument that it has an interest, sufficient to justify abridgment of First Amendment rights, in complying with its own constitution, (Comm'n Br. at 33) would impermissibly permit the state to abridge First Amendment rights by disabling itself from accomplishing its objectives by other less restrictive means. (See *Widmar v. Vincent*, 454 U.S. 263, 273-276 (1981).)

Finally, the asserted monopoly in communication enjoyed by PGandE is irrelevant in this case. (Comm'n Br. at 45, n. 48.) It is clear that cases such as *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), do not rest on broadcasters' monopoly on communication, just as it is clear that the newspaper's actual monopoly in *Tornillo* did not justify abridgement of the newspaper's right not to carry the messages of others. *Red Lion*, as this Court explained later, allowed access because "a broadcaster communicates through use of a scarce, publicly owned resource" (*Consolidated Edison Co. v. Public Service Comm'n, supra*, 447 U.S. at 543) and because "[n]o person can broadcast without a license, whereas all persons are free to send correspondence to private homes through the mails." (*Id.*) The issues in this case cannot be resolved by asking whether the empty space in a billing envelope is more "like" a newspaper or more "like" a radio or television station. Whatever restrictions imposed must meet First Amendment standards. The decision below does not meet First Amendment standards.

CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court of California, upholding the decision of the commission should be reversed; and the commission's decision should be vacated.

Respectfully submitted,

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